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No. _____

In The

Supreme Court of the United States

October Term, 1995

THEODORE S. PAPAILA,

Petitioner,

v.

UNIDEN AMERICA CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

1. Does Respondent, a corporation incorporated under the laws of the United States, have standing to assert as an absolute bar to Title VII of the Civil Rights Act of 1964 claims of race and national origin discrimination, the rights of a second foreign corporation under the Treaty of Friendship, Commerce and Navigation between the United States and Japan merely because the American corporation is owned by the second foreign national corporation?

2. In any balancing of interests between United States law on the one hand and a United States Treaty on the other, does the Supremacy Clause of the United States Constitution, as well as the rules of statutory construction and interpretation, require that United States law should take precedence over foreign treaties?

3. Does a conflict in the circuits require resolution by this Court of the important federal question arguably left open in this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 190 n.19 (1982) as to the rights of an American based corporation to assert the treaty rights of its parent?

4. Does the opinion of the Fifth Circuit herein conflict with this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982) by allowing Respondent to accomplish by indirection that which it can not do under this Court's decision in *Sumitomo*?

LIST OF INTERESTED PARTIES

Petitioner Theodore S. Papaila, an individual, and Uniden America Corporation

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PETITION FOR A WRIT OF CERTIORARI

I. OPINIONS BELOW:

This appeal is from an opinion of the Fifth Circuit Court of Appeals, *Papaila v. Uniden America Corp.*, 51 F.3d 54 (5th Cir. 1995) (Appendix A) which decision affirmed *Papaila v. Uniden America Corp.*, 840 F.Supp. 440 (N.D.Tex. 1994) (Appendix B), a final judgment of the district court on Motion of the Respondent for Summary Judgment on Petitioner's claims of race and national origin discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, [Title VII].

II. JURISDICTION:

The Fifth Circuit Court of Appeals issued its opinion on April 28, 1995. Petitioner timely invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

The Supremacy Clause, Article VI, clause 2 of the Constitution, provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .

The pertinent sections of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, [Title VII] are contained at 42 U.S.C. §2000e-2(a). The Treaty of Friendship, Commerce and Navigation between the U.S. and Japan, April 2, 1953, is cited as U.S.-Jap., 4 U.S.T. 2063 [the Treaty]

IV. STATEMENT OF THE CASE:

A. Factual Background:

On May 19, 1993, Petitioner filed this lawsuit alleging, *inter alia*, that Respondent Uniden America Corporation unlawfully discriminated against him and discharged him due to his national origin and his race in violation of Title VII. On December 3, 1993, Respondent moved for summary judgment. On January 10, 1994, the Court ruled that Petitioner's claims of race and national origin discrimination were precluded by virtue of the

1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan.

The District Court determined that the protection of the Treaty entitles Respondent to discriminate in favor of its Japanese employees. In so ruling, the District Court relied on the holding of the Seventh Circuit in *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991) (RE 3; V.4 p. 778-791), that an American subsidiary corporation of a Japanese corporation is entitled to assert all treaty rights of its parent corporation. Petitioner timely appealed to the United States Court of Appeals for the Fifth Circuit which court upheld grant of summary judgment. The Fifth Circuit, aligned with the Seventh Circuit, and held that an American corporation had standing to assert the treaty rights of its Japanese parent.

B. Petitioner's Title VII Claims:

Petitioner asserts that he was discriminatorily demoted and discharged because of his race and national origin. He also asserts that Japanese employees are given preferential treatment, including a different pay and benefits scale than non-Japanese employees, and most critically, are further given preferential treatment in application of Respondent's discipline and discharge procedures, including transfer rather than discharge in non-performance or under-performance situations.

C. Statement of Facts in Support of Petitioner's Title VII Claims:

Petitioner held the position of Vice-President-Government Sector or Vice President Market Development from June 1988 through March 1990. He then held the position of Vice-President Marketing, Commercial Communications Division from April 1990 through March 1992 (RE 2). As of April 1, 1992, Petitioner was demoted into a direct sales position (RE 2; V.4 p. 760-762; RE 6; V.2 p. 417-419, referring to V.3 pp. 521, 522; and V.2 p. 492).

Petitioner desired assignment to the mere favorable Canadian territory. He was told by his superior, Steven Fulford, a Corporate Vice-President, in a conversation relating to Petitioner's job opportunities, that he could not discuss any opportunities in Canada with him. (Re 2, 6; V.2 p. 420, referring to V.2 p. 493; V.4 p. 763). Vice President Fulford then assigned Masaki Hara to Canada in approximately April 1992 along with another employee (RE 6; V.2 p. 420, referring to V.3 p. 525). Masaki Hara is a Japanese "expatriate" then living in the United States (Re 2; V.4 p. 764; RE 6; V.2 p. 420, referring to V.3 pp. 583, 586, 540).

Mr. Hara did not do well from a sales point of view in Canada and he did not achieve his quota. Masaki Hara is still employed by Respondent and has been promoted to the position of managing the Marine Division (RE 6; V.2 p. 420, referring to V.3 pp. 538-539, 583, 587).

Petitioner also assertedly had performance and quota problems. He was terminated from the employ of the Respondent on January 4, 1993 (RE 2; V.4 p. 765). Petitioner was told by Mr. Huffman and Mr. Fulford that

"Japan" ordered his termination (RE 6; V.2 p. 421, referring to pp. 497-8).

Respondent has approximately sixteen Japanese "expatriate" employees who were hired in Japan by Uniden Corporation, the parent Japanese corporation and sent to Respondent by the parent Japanese corporation. These expatriate employees occupy managerial positions at Respondent (RE 2; V.4 p. 766). The base salary of the expatriate employees is based on the pay scale for employees working in Japan for the parent Japanese corporation (RE 2; V.4 p. 766). The pay scale is different than that used to pay American managerial employees (RE 6; V.2 p. 421; referring to V.2., 301).

Japanese expatriate employees have not been terminated when they were perceived to have performance problems. Mr. Fulford expressed the view that the Japanese expatriate employees are subject to different rules than the American employees. (RE 6; V.2 p. 422 and references therein; RE 2; V.4 p. 767). Japanese expatriates assigned to Respondent are eligible to receive the following in addition to their "base" salary and bonus plan: hardship allowance; working day allowance; housing and furniture allowance; away from home allowance; car or car allowance; tuition allowance; and medical insurance allowance. Examples given by Mr. Fulford of further differences in treatment include: cars provided to Japanese employees; different pay plans; and a clique from which Americans are excluded.

Petitioner is a caucasian United States Citizen of American national origin (RE 2; V.4 p. 759). Petitioner complained to Mr. Fulford of a double standard in the

way Japanese were treated. Petitioner has heard other employees, including Mr. Fulford, make remarks to the effect of "we are not Japanese" (RE 6; V.2 p. 423, and references therein). At no time below did the Respondent raise citizenship as the distinction in the treatment of its expatriate employees (V.2 pp. 237-248, 297-304).

D. Corporate Structure of Respondent UAC:

Respondent is an Indiana Corporation and an American subsidiary of Uniden Corporation, a Japanese Corporation based in Tokyo, Japan (RE 7; V.2 p. 298). As an American corporation, it enjoys all the benefits afforded to companies that choose to incorporate in America.

E. The Treaty of Friendship, Commerce and Navigation:

Under the Treaty of Friendship, Commerce and Navigation, April 2, 1953, U.S.-Jap., 4 U.S.T. 2063 [the Treaty], Japanese corporations have the right, if they so choose, to incorporate under the laws of the United States. Once they do so, they are an American corporation, subject to American laws (RE 6; V.2 p. 433, referring to V.3 p. 595).

F. Homogeneity of Japanese Society:

Japanese society is remarkable in its homogeneity. Ninety-nine percent of the population of Japan is composed of individuals of Japanese ethnic origin. RONALD E. DOLAN and ROBERT L. WORDEN, JAPAN, A COUNTRY STUDY,

(1990); Brief for Petitioner and Cross-Respondent at 17-18, *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, (1982) (RE 6; V.4; p. 437). Respondent presented no evidence to rebut that finding or to present evidence that said Japanese ex-patriates were not of Japanese national origin.

V. REASONS FOR GRANTING CERTIORARI:

Petitioner respectfully submits that there are four reasons, as more fully articulated herein, that this Court should grant certiorari herein. First, Petitioner asserts that an American corporation can not assert as an absolute bar to the laws of the United States the fact that its parent Japanese company, but not itself, has certain treaty rights. In short, an American corporation has no standing to assert any such rights of a foreign corporation situated in an arms length relationship with itself.

Secondly, in any balancing of interests between United States law and United States treaties, petitioner asserts that the Supremacy Clause of the United States Constitution as well as the rules of statutory construction and interpretation require that the United States laws take precedence or, at the least, enjoy a greater accommodation to Treaty rights than granted herein.

Thirdly, there is a conflict in the circuit courts which requires resolution by this Court of the important federal question arguably left open in this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, (1982) as to the rights of an American based corporation to assert the Treaty rights of its parent. Specifically, the

Fifth and Seventh Circuits are in conflict with the Second Circuit.

Lastly, Petitioner respectfully asserts that the opinion of the Fifth Circuit herein is in apparent conflict with this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176 (1982) and attempts to accomplish by indirection what this Court has prohibited directly.

A. Respondent, a Corporation Incorporated Under the Laws of the United States, Does Not Have Standing to Assert as an Absolute Bar to Title VII of the Civil Rights Act of 1964 Claims of Race and National Origin Discrimination, the Rights of a Second Foreign Corporation Under the Treaty of Friendship, Commerce and Navigation between the United States and Japan Merely Because the American Corporation is Owned by a Japanese National Corporation:

1. Respondent, an American Corporation, Has No Standing Under the Treaty of Friendship, Commerce and Navigation to Assert any Rights Accorded to its Parent Corporation:

In granting absolute standing for one corporation to assert all of the rights of a second, the Fifth Circuit has attempted to answer the question specifically left open by footnote 19 of this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 190 n.19 (1982) in which this Court stated that: "We also express no view as to whether Sumitomo may assert any Article VIII(1) rights of its parent."

In deciding in the affirmative, however, Petitioner respectfully asserts that the Fifth Circuit has ignored Supreme Court precedent. Thus, this Court has been exceedingly hesitant to allow a litigant to base a claim or a defense on the rights of a person not before the Court. *See Barrows v. Jackson,* 346 U.S. 249, 255 (1953).

This Court has taken two approaches in allowing parties to assert the rights of third parties: one approach examines the relationship between the litigant and the third party. *See, e.g. Griswold v. Connecticut,* 381 U.S. 479 (1965); *Barrows v. Jackson,* 346 U.S. 249 (1953); *NAACP v. Alabama,* 357 U.S. 449 (1958). The other examines the impairment of rights of the third party. *See, e.g. Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Craig v. Boren,* 429 U.S. 190 (1976).

Under neither test does Respondent have standing herein. Thus, while undoubtedly there is a relationship between the parent Japanese corporation, Uniden Corporation, and its American incorporated subsidiary, Respondent UAC, the two nevertheless are arms-length corporate entities and as such both corporations enjoy all the protections and shields afforded under the corporate structure. No attempt has been made by Respondent to pierce the "corporate veil" herein, no evidence has been presented by Respondent that would allow this Court to pierce such corporate veil and there is no assertion that the second American corporation is but a mere sham corporation indistinguishable from the first.

Secondly, there has been no impairment of rights of the second party not before the Court. Thus, as this Court has readily held in cases involving Japanese corporations,

such corporations, when themselves involved in litigation, are perfectly capable of enforcing their own statutory treaty rights. *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176 (1982). Moreover, the second corporation enjoys no unfettered right to order an American corporation to violate American laws.

2. Respondent Cannot Assert the Article VIII(1) Rights of Its Parent Corporation:

Respondent is an American corporation with no rights under Article VIII(1) of the Treaty. Therefore, Petitioner respectfully asserts that it cannot assert the Treaty rights of its Japanese parent. *See Spiess v. C. Itoh & Co., (America), Inc.,* 643 F.2d 353 (5th Cir. 1981) *vacated,* 457 U.S. 1128 (1982), *on remand,* 687 F.2d 129 (5th Cir. 1983), *dismissed on other grounds,* 725 F.2d 970 (5th Cir. 1984). In the district court's decision in *Spiess,* on remand, the court found that:

> The defendant, by contending that it has standing to assert the substantive treaty rights of its parent, is attempting to accomplish indirectly what it cannot accomplish directly. The Court does not believe that either the Treaty or the *Sumitomo* case would permit that to occur. Accordingly, defendant's motion to dismiss for failure to state a claim is denied *in toto.*

Spiess v. C. Itoh & Co. (America) Inc., 725 F.2d 970, 973 (5th Cir. 1984) (*Spiess III*), citing the district court. Clearly, as articulated by the district court in the *Spiess III* case, neither the Treaty nor the *Sumitomo* case support the subsidiary's invocation of the parent's Article VIII(1) Treaty rights. A similar conclusion was reached by a

district court in the Second Circuit in *Goyette v. DCA Advertising*, 66 Fair Empl. Prac. Cas. (BNA) 1045, 1054 (S.D.N.Y. 1983) ("the FCN Treaty does not give Japanese corporations any increased privilege to discriminate on the basis of national origin." *Id.* at n. 18).

3. By the Plain Language of the Treaty, There was no Intent to Permit United States Subsidiaries to Invoke the Article VIII(1) Rights of The Parent:

The plain language of the Treaty does not indicate an intent to permit United States subsidiaries to invoke the Article VIII(1) rights of their parents. Thus, under normal principles of statutory interpretation, if a party is specifically enumerated in one section of a statute but omitted from a similar enumeration in another section, the exclusion is held to be intentional. This was done by the drafters of the treaty.

The language of the Treaty permits some of its provisions to be invoked by "nationals of [Japan]," some by "companies of [Japan]," and still others by "enterprises controlled by companies of [Japan]." 4 U.S.T. 2066 (April 2, 1953). By categorically separating wholly-owned subsidiaries "enterprises controlled by companies of [Japan]" from Japanese corporate parents "companies of [Japan]," the Treaty, by its plain language, intends that controlled companies can only invoke the rights expressly conferred on them in the Treaty.

It is no mere accident that the Treaty uses three wholly different terms for nationals, companies and enterprises controlled by companies. *See* Brief of United

States as Amicus Curiae at 2, *Sumitomo Shoji America, Inc. v. Avagliano, et al.*, Nos. 80-2070, ("The conclusion that the Parties did not intend for enterprises incorporated in the United States but controlled by a Japanese company to invoke the Article VIII(1) employment privilege is reinforced by the fact that elsewhere in the Treaty the Parties expressly conferred rights on such controlled enterprises." *Id.* "The very creation of these three terms of art is a strong indication that the drafters viewed each as representing a distinct entity." *Spiess*, 643 F.2d at 365 (Reavley, J., dissenting).

In his well reasoned dissent, Judge Reavley goes on to explain:

> Articles VII(1), VII(4), XVI(2), VI(3) and VI(4) (read in conjunction with paragraph 2 of the Protocol), grant express rights to "nationals and companies of either Party" operating in the territory of the other party and then *specifically extend* the same or similar rights to "enterprises controlled by such nationals or companies."

Id., at 366-67, footnotes omitted (emphasis in original). Thus, the inclusion of "enterprises controlled by such nationals or companies" in the same sections as "companies of either Party" would be redundant if the drafters of the Treaty intended that the "enterprises controlled by such nationals or companies" could also assert the rights of the "companies of [either Party]." *Id.*, at 366-67.

The drafters of the Treaty clearly intended for some Articles to apply only to certain entities. Article VIII(1) was intended to apply only to "Nationals and companies of either Party." Only if the Treaty was completely silent

as to "enterprises controlled by such nationals or companies," would another interpretation be consistent with the Treaty's language. However, given that the drafters used the "enterprises controlled" language for five provisions within the Treaty, but not Article VIII(1), their exclusion from Article VIII(1) is more than a mere oversight.

Thus, the correct statutory interpretation is that Article VIII(1) does not include "enterprises controlled" by Japanese corporations. To use the words of Judge Reavley, granting subsidiaries the right to assert Treaty rights would "blatantly duplicate grants of rights." *Spiess*, 643 F.2d at 367.

B. In any Balancing of Interests Between United States Law on the One Hand and a United States Treaty on the Other, the Supremacy Clause of the United States Constitution, as Well as the Rules of Statutory Construction and Interpretation Requires that the United States Law Should Take Precedence:

1. Title VII of the Civil Rights Act is a Broad Based Statute Enacted to Eliminate All Vestiges of Discrimination:

A mere thirty years ago, Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-20002-17, grounded firmly on the Commerce clause of the United States Constitution intending to "remove obstructions to the free flow of interstate commerce and foreign commerce and to insure the complete and full enjoyment by

all persons of the rights, privileges and immunities secured and protected by the Constitution."[1]

The Act reflects "the commitment of Congress to the goal of equal employment opportunity for all our citizens."[2] It now stands as the centerpiece of an entire panoply of protections to end employment discrimination in the American work place. Its purpose is to eradicate discrimination on the basis of race, color, national origin, sex and religion.

In order to effectuate such purpose, the employment practices outlawed in Title VII are very broadly defined. Section 703(a)(1) bans discrimination by employers; Section 703(a)(2) bans segregation in the work place. So too, the definition of employer is extremely broad as Section 701(b) encompasses most all but the very small employer. Moreover, as amended in 1972, 1978 and 1991, Title VII enables the federal courts as well as the Equal Employment Opportunity Commission ("EEOC") to review the hiring, training, promotion and termination practices of employers as well as almost all labor unions and employment agencies. By so doing, Congress sought to create a statute to provide a broad based law of wide jurisdiction and meaningful remedies to eradicate societal discrimination on the basis of race, national origin, sex and religion.

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[1] H.R. Rep. No. 914, 88th Cong., 1st Sess. 26 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2402.

[2] H.R. Rep. No. 238, 92nd Cong., 1st Sess. 3 (1971), reprinted in 1964 U.S.C.C.A.N. 2137, 2140.

2. Purpose of the Treaty:

The Japanese-American Treaty, enacted eleven years prior to Title VII, is only one in a long line of Friendship, Commerce and Navigation treaties between the United States and other nations. The central theme of these treaties has remained essentially constant since the first treaty was signed between the United States and France in 1778. This theme is to provide a medium by which two nations could "provide for the rights of each country's citizens, their property and other interests, in the territories of the other, and for the rules mutually to govern their trade and shipping." *Id. Citing,* Herman Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practices,* 5 AM. J. COMP. L. 229, 230-31 (1956). Stated another way, the objective of the treaty is "to secure non-discrimination, or equality of treatment: a sort of equal protection of the laws objective." Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation,* 42 MINN. L. REV. 805 (1958).

The purposes of the treaties is for citizens of each county to have the same rights in a foreign country as the citizens of the host country. As noted by the Fifth Circuit in *Spiess v. C. Itoh & Co. (America), Inc.,* 643 F.2d 353, 359 (5th Cir. 1981), however, the objective to achieve such "national treatment" was not always possible. *Id.* Thus, where such equal protection of the laws was not achievable, the treaties sought treatment at least as favorable as the citizens of any other foreign nation. *Spiess,* 634 F.2d at 360; *see also, Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 188, n. 18 (1982).

Nowhere in the treaties is it intended by the negotiators or authors for a foreign national to be given superior rights to the citizens of the host country. *See Sumitomo*, 457 U.S. at 188 ("The purpose of [the treaty] was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage"). Very specifically, nowhere in the treaties was it intended for a Japanese corporation to be able to order an American corporation to treat its American employees differently and more severely than its Japanese ex-patriate employees especially in the critical areas of differences in treatment as to the standards for discharge, discipline and/or transfer of employees.

Thus, the purpose of such provisions as the "of their choice" language of VIII(1) of the United States-Japan Treaty was to "prevent the imposition of ultra-nationalistic policies with respect to essential executive and technical personnel." Herman J. Walker, *Provisions on Companies in U.S. Commercial Treaties*, 50 AM. J. INT'L. L. 373, 386 (1956). This provisions would prevent the host country from forcing an unfair quota system on foreign corporations. The purpose of the "of their choice" provision was not to allow foreign corporations, much less American subsidiaries of foreign corporations, the right to wholly ignore American statutes, including Title VII.

3. The Right Granted Under the Treaty are Limited and do not Include the Right to Engage in Discriminatory Treatment in the Terms and Conditions of Employment:

Article VIII(1) of the Treaty reads:

> Nationals and companies of either Party shall be *permitted to engage*, within the territories of the

> other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.

Treaty, 4 U.S.T. at 2070 (emphasis added).

Under a strict reading, the phrase "permitted to engage" would allow for the placement of Japanese nationals in certain positions within the United States. The Treaty does not permit discrimination in the treatment of American citizens by Japanese corporations, and it does not follow that the right of placement includes the right to preferential treatment of such personnel in a manner inconsistent with federal laws prohibiting discrimination.

A strict interpretation does not provide foreign businesses shelter from any federal employment laws except as far as the laws conflict with the business' Treaty right to place its own nationals in certain delineated positions, a right not at issue in this case. *See MacNamara v. Korean Air Lines*, 863 F.2d 552 (3d. Cir. 1988) *cert. denied*, 110 S.Ct. 349 (1989). In interpreting the Korean Treaty, which contains language substantially similar to the Japanese Treaty, the *MacNamara* court stated:

> In short, this history persuasively demonstrates that the target of Article VIII(1) was domestic legislation that discriminated on the basis of citizenship and that the provision was necessary *for the limited purpose* of securing to foreign investors *the freedom to place* their own citizens in key management positions. . . .

MacNamara, 863 F.2d at 869 (emphasis added). The court further stated:

> If [Article VIII(1)] is interpreted to confer an immunity from Title VII and the ADEA in connection with personnel decisions involving citizens of the foreign company's country, it would give foreign businesses a right not possessed by domestic employers. *Id.*

4. Respondent engages in Discriminatory Treatment of American Employees, Which is Beyond the Scope of Rights Granted under the Treaty:

As noted above, Respondent pays its Japanese "expatriate employees" under a different pay scale than that used for non-Japanese expatriate employees. Additionally, they are entitled to additional fringe benefits not provided to non-expatriate employees. Very critically herein, Petitioner also asserts that Japanese employees are provided preferential treatment when they are unsuccessful in the course of their employment with UAC, in that they are held to different – lesser – standards of performance, and transferred rather than discharged.

Petitioner presents to this court a very simple proposition, that is, that once employees are placed in the corporate structure of Respondent UAC, the differential treatment engaged in by Respondent, an American corporation, on behalf of Japanese expatriate employees results in illegal discrimination as defined in Title VII against persons not of Japanese origin.

5. Title VII Takes Precedence over the Treaty:

Even assuming *arguendo,* that the Respondent, an American Corporation, could assert the Treaty rights of its Japanese parent, under a traditional conflict of laws analysis, because federal statutes like Title VII and treaties are generally accorded the same level of authority, when there is a conflict between the statute and the treaty, the last in time controls. *See Chew Heong v. United States,* 112 U.S. 536 (1884).

Thus, given the 1964 effective date of Title VII, clearly any unresolved conflict between the Treaty of 1953, and the anti-discrimination laws should be resolved in favor of Title VII.

Further, to avoid repealing laws by implication, this Court has consistently held that statutes and treaties should be read in harmony whenever possible. *See Johnson v. Browne,* 205 U.S. 309 (1907). Reading Title VII and the Treaty in such harmony: the Treaty may grant Japanese companies the right to the *placement* of personnel in certain delineated positions within subsidiary corporations, generally managerial or technical; and Title VII allows for employment preferences under some limited circumstances. *See e.g., Dothard v. Rawlinson,* 433 U.S. 321, 334-337 (1977). Reading the Treaty and Title VII in harmony thus allows for the *limited* right of preferential placement of Japanese individuals into delineated positions of management and positions requiring technical expertise. However, it does not follow that because the company has the limited right of placement it also may discriminate in the *treatment* of Japanese employees as opposed to American employees or to discriminate by

placing such ex-patriates in non-technical sales positions with favored territories or regions such as the Canadian region herein.

C. A Conflict in the Circuits Requires Resolution by this Court of the Important Federal Question Arguably Left Open in this Court's Decision in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), as to the Rights of an American Based Corporation to assert the Treaty Rights of its Parent as the Fifth and Seventh Circuits are in conflict with the Second Circuit.

In *Avagliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2nd Cir. 1981) *rev'd and remanded on other grounds*, 457 U.S. 176 (1982), the Second Circuit directly decided the question of whether the "freedom-of-choice" language of Article VIII of the Treaty exempts a Japanese Company from Title VII of the Civil Rights Act of 1964 as far as the company's executive personnel are concerned. The Court held that "the treaty does not have such effect." *Id.*, 638 F.2d at 558. The court went on to explain that the "freedom-of-choice" language does not give Japanese companies license to violate American laws prohibiting discrimination in employment. *Id.* The court further held that

> "[s]ubjecting a Japanese company to Title VII is consistent with the language and purpose of Article VIII of the Treaty, since Title VII, construed in the light of the Treaty, would not preclude the company from employing Japanese nationals in positions where such employment

> is reasonably necessary to the successful operation of its business."

Id. 638 F.2d at 559 (recognizing the *bona fide* occupational qualification provisions of Title VII allows for a construction of Title VII and the Treaty in a manner that would give due weight to the Treaty rights and the "unique treaty requirements" of a Japanese company doing business in the United States. *Id.*)

Avagliano was later reversed and remanded by this Court upon a finding that a wholly-owned subsidiary of a company of Japan was not a "Company of Japan" for Treaty purposes, and therefore was not entitled to the benefits of the Treaty. *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 189 (1982). Because the decision of the Supreme Court was on different grounds, the Second Circuit opinion in the *Avagliano* case is still "alive and well" for purposes of determining this question. *See, Goyette v. DCA Advertising,* 66 Fair Empl. Prac. Cas. (BNA) 1045, 1064 (S.D.N.Y. 1993) ("the FCN Treaty does not give Japanese corporations any increased privilege to discriminate on the basis of national origin." *Id.* at n. 18)

The Seventh Circuit and the Fifth Circuit, however, are in direct conflict with the decision of the Second Circuit in *Avagiliano.* Both courts have clearly held that a subsidiary may assert the treaty rights of its parents, apparently including in those rights the right to discriminate against non-Japanese executives "at-will." *Papaila v. Uniden America Corp.,* 51 F.3d 54, 56; *Fortino v. Quasar,* 950 F.2d 389 (7th Cir. 1991). Neither the Fifth nor the Seventh Circuit question the rights of the Japanese parent to favor

Japanese citizens in placing employees to manage its shareholder interest in violation of Title VII. Neither circuit attempts to read the Treaty and Title VII in harmony, as is required under the Supremacy Clause and the rules of statutory construction and interpretation, choosing instead to give a carte blanche broad reading to the "freedom-of-choice" language of the Treaty. In so doing, the courts over accommodation to Treaty concerns nullifies Title VII rights in an American corporation to American employees in disregard of the Supremacy Clause of the United States Constitution and the rules of statutory construction and interpretation.

The holdings of the Fifth and Seventh Circuits in *Papaila* and *Fortino,* therefore, are in direct conflict with the established holding of the Second Circuit in *Avagliano.*

D. The Opinion of the Fifth Circuit Herein is in Apparent Conflict with this Court's Decision in *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176 (1982)

1. Neither *Papaila* nor *Fortino* Correctly Distinguish or Interpret Supreme Court Precedent:

In both *Papaila* and *Fortino,* the Courts endorsed a right to assign treaty rights of a Japanese parent company to its wholly owned subsidiary incorporated under the laws of the United States.

In the Second Circuit Court of Appeals, Sumitomo argued that Article VIII(1) protection was based upon the parent's Treaty right to control and manage its American

subsidiary and that deprivation of Article VIII(1) rights to the subsidiary would severely undercut its parent's Treaty rights. *See Avagliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552, 554, 556-557 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1981). Finding it unlikely that the Treaty would give Japanese companies the right to manage its United States subsidiaries yet bar those same subsidiaries from invoking treaty protection, the appellate court permitted Sumitomo, a United States subsidiary of a Japanese parent, to assert treaty rights as a "company of Japan." *Id.*

This Court specifically rejected this "right to assign" defense and precluded the United States, subsidiary from invoking Treaty rights.

In both *Papaila* and *Fortino*, Respondents argued that they must be allowed the standing to assert Article VIII(1) rights because a judgment against the subsidiary would supposedly set the treaty rights "at naught."

Thus, both the Fifth Circuit herein, and the Seventh Circuit, accepted virtually the same argument that this Court has emphatically rejected in *Sumitomo* and attempt to accomplish by indirection that which they cannot do directly. Thus, only the method of invoking Article VIII(1) differed: in *Papaila, Sumitomo* the defendant used the "company of Japan" approach; in *Fortino* the parent-right invocation method was used. The rationale for both methods is the same: the alleged derogation of the parent's FCN treaty rights by denial of Article VIII(1) rights to the subsidiary.

Furthermore, to the extent that both Courts rely on the absence of any contention on behalf of Sumitomo that the parent company directed its conduct, their reliance is misplaced as that alleged "missing" contention was argued both by brief and in oral argument. Thus both the Fifth Circuit and the Seventh Circuit wholly fail to establish any features which would properly distinguish the *Fortino* case or the *Papaila* case from the *Sumitomo* case.

2. Fortino Relied upon by Papaila, Ignores Language in *Sumitomo* Which Does not Support the Invocation of Treaty Rights by Subsidiaries:

The *Sumitomo* decision does not support the *Papaila* Court nor the *Fortino* Court's decision that the subsidiary must be allowed to assert its parent's Treaty rights. Even though this Court failed to reach a decision on this issue because of procedural defects in the manner in which the issue was raised, based upon the Court's analysis of the Treaty, the Court would have precluded the subsidiary invocation of treaty rights had the issue been properly raised.

First, this Court stated that United States branches of Japanese corporations would have advantages "conferred by Article VIII(1)" that the American subsidiaries would not have. *Sumitomo*, 457 U.S. at 189. The logical extension of this statement is that if the United States subsidiary is allowed to invoke the Treaty right of its parent, there would no longer be any advantage "conferred by Article VIII(1)" to the United States branch of Japanese corporations not incorporated in the U.S. which the subsidiary

does not also have. Second, in *Sumitomo*, this Court stated that "local subsidiaries . . . are entitled to the rights, and subject to the responsibilities of other domestic corporations." *Sumitomo*, 457 U.S. at 188. Taking this statement to its logical conclusion, if an American corporation has violated Title VII because of discriminatory practices dictated by their shareholders/owners, then an American subsidiary would be liable for the Title VII violation even if the discriminatory actions were dictated by its Japanese shareholder/owner.

The *Sumitomo* Court's language concerning the "responsibilities" of a domestic corporation, in order to remain in comity with Title VII, must be interpreted to block the parent-right invocation by U. S. subsidiaries of Japanese corporations.

Thus, whether the subsidiary attempts to invoke Treaty rights as a "company of Japan" or, as here, on behalf of its parent company, the result is the same, an American corporation attempting to assert Treaty rights not granted to it, to enable it to assert the rights and privileges of an American corporation, yet escape the responsibilities of compliance with American laws.

VI. CONCLUSION:

Therefore, for the reasons set forth herein, Petitioner Theodore Papaila respectfully requests that the writ of certiorari be granted.

Respectfully submitted

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APPENDIX A

Theodore S. PAPAILA, Plaintiff-Appellant,

v.

UNIDEN AMERICA CORP.,
Defendant-Appellee.

No. 94-10113.

United States Court of Appeals,
Fifth Circuit.

April 28, 1995.

Former employee of domestic subsidiary of foreign corporation brought action against subsidiary for employment grievances including discrimination based on race and national origin. On defendant's motion for summary judgment, the United States District Court for the Northern District of Texas, John H. McBryde, J., 840 F.Supp. 440, found discrimination claims were precluded by Friendship, Commerce and Navigation Treaty, and plaintiff appealed. The Court of Appeals, Duhé, Circuit Judge, held that subsidiary had standing to assert parent's rights under Treaty.

Affirmed.

Appeal from the United States District Court for the Northern District of Texas.

Before JONES, DUHÉ and STEWART, Circuit Judges.

DUHÉ, Circuit Judge:

Theodore Papaila sued Uniden America Corp. (UAC) alleging employment grievances including discrimination

based on race and national origin. On UAC's motion for summary judgment, the district court held that the race and national origin discrimination claims were precluded by the United States-Japan Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. VIII(1), 4 U.S.T. 2063, 2070. Plaintiff voluntarily dismissed his other claims and appeals the summary judgment. We affirm.

I. Background

UAC is an Indiana Corporation and a wholly owned subsidiary of Uniden Corporation, a Japanese entity based in Tokyo. Plaintiff, a caucasian of American national origin, alleges that Japanese citizens who are employees of UAC receive favorable treatment: they receive higher base salaries, fringe benefits (e.g., housing and tuition allowances), and job protection (transfer rather than discharge in case of poor job performance) that Plaintiff did not receive. Plaintiff was demoted then terminated by UAC.

The summary judgment evidence established that, of UAC's approximate 400 employees, only sixteen are Japanese citizens who were treated differently than other employees. Each of those sixteen employees, called by the parties "expatriates," was sent on a temporary work assignment by the Japanese parent to protect its interests in the subsidiary. The remainder of UAC's employees, including six of Japanese race and national origin (but not citizenship), were directly controlled by UAC and did not receive the same preferential treatment as the expatriates.

II. Treaty Provision

Under the Treaty a Japanese corporation may incorporate a subsidiary under the laws of the United States. Treaty, art. VII, 4 U.S.T. at 2068. Once it does so, the subsidiary is an American corporation, subject to American laws, including Title VII. Article VIII(1) of the Treaty provides, "[C]ompanies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." 4 U.S.T. at 2070. The Treaty allows a foreign corporation such as Uniden Japan to discriminate in favor of citizens from its own country in filling the specified high-level positions within the United States. *See Wickes v. Olympic Airways*, 745 F.2d 363, 367 (6th Cir.1984) (interpreting similar provision in United States-Greek Treaty of Friendship, Commerce & Navigation); *see also MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1145 (3rd Cir.1988) ("[T]he provision was necessary for the limited purpose of securing to foreign investors the freedom to place their own citizens in key management positions.") (interpreting similar provision in United States-Korean Treaty), *cert. denied*, 493 U.S. 944, 110 S.Ct. 349, 107 L.Ed.2d 337 (1989).

Thus, Article VIII to a limited extent permits Japanese companies to discriminate in favor of their fellow citizens because of their citizenship.

III. Standing to Assert Rights of Parent

As a domestic corporation, UAC has no rights under Article VIII(1), because Article VIII(1) applies only to "companies of [Japan]." *Sumitomo Shoji Am., Inc. v. Avagliano,* 457 U.S. 176, 189, 102 S.Ct. 2374, 2381, 72 L.Ed.2d 765 (1982) (holding that American subsidiary of a Japanese parent had no Treaty defense because the subsidiary was not a "company of Japan"). *Sumitomo* limited its ruling to the subsidiary's assertion of rights on its own behalf and "express[ed] no view as to whether [the subsidiary] may assert any Article VIII(1) rights of its parent." *Id.* at 189 n. 19, 102 S.Ct. at 2382 n. 19. UAC contends that it has standing to assert the Treaty defense of its parent.

We agree, following the lead of our sister circuit that has held that a subsidiary may assert the Treaty rights of the parent, "at least to the extent necessary to prevent the treaty from being set at naught." *Fortino v. Quasar Co.,* 950 F.2d 389, 393 (7th Cir.1991). As in *Fortino,* Uniden Japan rather than UAC made all the allegedly discriminatory decisions in the employment relationship with the expatriates.[1] The rationale of Fortino applies to this case:

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[1] The expatriates were hired in Japan by the parent and were assigned by the parent to UAC. They all hold managerial positions, and their mission is to manage Uniden Japan's shareholder interests. They are subject to transfer at the request of Uniden Japan. Their salaries are set in Japan and Uniden Japan directs that UAC maintain a separate UAC payroll account for the expatriates; the parent sets their salaries, wages, benefits, hours and evaluates their job performance. 2 R. 298-302.

> A judgment that forbids [UAC] to give preferential treatment to the expatriate executives that its parent sends would have the same effect on the parent as it would have if it ran directly against the parent: it would prevent [Uniden Japan] from sending its own executives to manage [UAC] in preference to employing American citizens in these posts.

Fortino, 950 F.2d at 393.

Since UAC did not itself cause any of the discriminatory conduct, we hold that UAC may invoke its parent's Treaty rights, at least with respect to those employment decisions dictated by the parent. *Cf. id.* (distinguishing *Sumitomo* for the very reason that "there was no contention [in *Sumitomo*] that the parent had dictated the subsidiary's discriminatory conduct").[2]

IV. Conclusion

The domestic subsidiary may assert the Article VIII(1) Treaty rights on behalf of its Japanese parent

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[2] Additionally, we note that all of the alleged favoritism was based on citizenship. *Fortino* recognized a difference between distinctions based on citizenship, which are permitted by the Treaty, and distinctions based on national origin, which Title VII prohibits. *Fortino*, 950 F.2d at 391-92. Like the subsidiary in *Fortino*, UAC employees of Japanese race and national origin who were not Japanese citizens were not shown favoritism. *Id.* at 393. Arguably, Title VII is not implicated. *See* 42 U.S.C.A. § 2000e-2(a)(1) (West 1994) (prohibiting employment discrimination based on race or national origin); *see also Fortino*, 950 F.2d at 393 (noting that favoring Japanese-American employees would have been "true national-origin discrimination since they are not citizens of Japan").

corporation. This Treaty right includes the right to favor Japanese citizens in placing executives to manage its shareholder interest. Plaintiff fails to demonstrate a genuine issue of material fact that would preclude a summary judgment in favor of UAC on Plaintiff's claims of Title VII discrimination. Plaintiff's request that this Court render a judgment for him is denied.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

THEODORE S. PAPAILA, Plaintiff,	§	
vs.	§	NO. 4:93-CV-336-A
UNIDEN AMERICA CORPORATION, Defendant.	§	

MEMORANDUM OPINION
and
ORDER

(Filed Jan. 10, 1994)

Came on to be considered in the above-styled and numbered action the motion of defendant, Uniden America Corporation, ("Uniden") for summary judgment. The court having considered the motion, the response of plaintiff, Theodore S. Papaila, ("Papaila") the summary judgment evidence, the record, and applicable authorities, has concluded that the motion should be granted in part, as set forth herein.

I.

Plaintiff's Complaint

Papaila makes the following allegations in his first amended complaint:

On May 3, 1988, he entered into a contract of employment with Uniden. Uniden breached the contract on April 1, 1992, by unilaterally reducing plaintiff's compensation plan, and by demoting him to the position of Vice President, International Sales, Mexico, Telektra Account. On January 3, 1993, Uniden again breached the contract by discharging him. Uniden engaged in a continuing pattern of discriminatory conduct against Papaila because of his age, forty-six, his race, white, and his national origin, American; and, Uniden discriminated against him in the terms, conditions and privileges of his employment and by demoting and discharging him.

Papaila asserts a cause of action pursuant to 42 U.S.C. § 2000e *et seq.* ("Title VII") based on the alleged race and national origin discrimination; and, he asserts a cause of action pursuant to 29 U.S.C. § 621 *et seq.* ("ADEA") based on the alleged age discrimination. He claims that Uniden has violated the Texas Commission on Human Rights Act of 1983 ("TCHRA"), Tex. Rev. Civ. Stat. Ann. art. 5221K, § 1.01 *et seq.* by discriminating against him on the basis of age, race, and national origin.

II.

The Motion for Summary Judgment and Plaintiff's Response

A. Uniden maintains that Papaila was an at-will employee and any alleged modification of such status through an employment contract is unenforceable by reason of the statute of frauds. To defeat the assertion that he was an at-will employee, Papaila relies on oral representations made to him by Yuzo (Nick) Noda ("Noda"), an

Executive Vice President of Uniden, and a letter he sent to Noda confirming those representations. He contends that his intent that the letter form a contract between him and Uniden, coupled with the handwritten notations and changes he says were made by Noda to the letter, constitute sufficient evidence to defeat Uniden's motion for summary judgment.

B. According to Uniden, the Friendship, Commerce and Navigation Treaty between the United States and Japan, Apr. 2, 1953, ("FCN Treaty") 4 U.S.T. 2063 allows it to exercise the rights of Uniden Corporation ("Uniden Japan"), its parent corporation, to favor citizens of Japan in matters relating to employment, and, therefore, it cannot be liable for discriminating against Papaila on the basis of his race and national origin. Papaila maintains that Uniden does not have standing to assert such treaty rights and that, even if it did, Title VII supersedes the FCN Treaty.

C. Further, Uniden contends that Papaila's demotion was made for legitimate business reasons. Papaila has failed to respond to that contention. Finally, Uniden contends that because, after his termination, Papaila's job responsibilities were assumed by Don Huffman ("Huffman"), who is nine years older than Papaila, Papaila is unable to prove a *prima facie* case of age discrimination. Papaila responds by arguing that the summary judgment evidence raises an issue of fact that his discharge was because of his age.

* * *

At the pretrial conference held in this action on January 4, 1994, the court made known its tentative views that

Uniden's motion for summary judgment has merit as to the claims discussed in A. and B. above. The court has concluded that the motion for summary judgment should be granted as to those grounds. The court is not prepared at this time to rule on the ground of Uniden's motion asserting entitlement to summary judgment as to Papaila's age discrimination claims. The rulings in this memorandum opinion and order are limited to the grounds of Uniden's motion that are described in A. and B. above.

III.

The Summary Judgment Evidence Pertinent to the Grounds of Uniden's Motion Dealt with by this Memorandum Opinion and Order

The summary judgment evidence of Uniden consists of (i) plaintiff's responses to interrogatories, (ii) a letter clarifying plaintiff's answer to interrogatory No. 34, (iii) a letter from Papaila to Noda accepting Uniden's offer of employment, (iv) a copy of the complaint filed by Papaila with the Texas Commission on Human Rights and the EEOC, (v) Papaila's affidavit in support of such complaint, (vi) Papaila's letter to Ms. Vivian Moore, an investigator with the EEOC, (vii) the affidavit of Kazunari Ikeda, Uniden's Director and Vice President, (viii) the affidavit of Katrina G. Desjardin, Uniden's Employment Manager, and (ix) excerpts from the oral depositions of Steven E. Fulford ("Fulford"), Corporate Vice President and General Manager of the Corporate Communication Division, and Susamo Ohashi ("Ohashi"), Managing Director of Uniden Japan and President of Uniden America Corporation. Papaila's summary judgment evidence

consists of excerpts from the oral depositions of (i) Robert J. Gibbs, Executive Vice President of Uniden, (ii) Thomas Carrello ("Carrello"), Vice President of Canadian Operations for Uniden, (iii) Papaila, (iv) Fulford, (v) Huffman, Vice President, International Sales, (vi) Ohashi, and (vii) Dr. Carl Swanson, an expert for Papaila. The summary judgment evidence shows without dispute that:[1]

Uniden is an Indiana Corporation and a subsidiary of Uniden Japan, which is a Japanese corporation with its headquarters in Tokyo, Japan. Uniden Japan is engaged in the business of manufacturing and selling a variety of electronic equipment.

Papaila is a white United States citizen of American national origin. On April 20, 1988, Uniden made an oral offer of employment to Papaila, which he accepted. The writing upon which Papaila bases his claim for breach of contract is a letter dated May 3, 1988, from Papaila to Noda. No one acting for Uniden signed this letter. Papaila testified by deposition that Noda orally agreed to the terms in the letter.

From June 1988 through March 1990 Papaila held the title of Vice President-Government Sector or of Vice President Market Development. From April 1990 through March 1992, Papaila held the position of Vice President Marketing for Uniden's Commercial Communication

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[1] Many of these facts have also been stipulated to by the parties in their agreed "pretrial order" and during the pretrial conference held on January 4, 1994. The court has also considered as part of the summary judgment record admissions made by plaintiff in his complaint and in his response to Uniden's motion.

Division. During 1991 and 1992, Uniden Japan placed pressure on Uniden to eliminate employees who were not assigned individual quota or who were not meeting their quota. On April 1, 1992, Papaila was placed in the position of Vice President International Sales-Telektra. He reported directly to Huffman, and such position had an individualized quota and a lower salary. This is the demotion upon which Papaila bases – part of his claims.

On October 6, 1992, Fulford and Huffman sent a memo to Papaila stating that he had not made his quota in the first and second quarters of that year and inquired how he intended to meet his quota thereafter. In December 1992, it appeared that Papaila was not going to meet his third-quarter quota. In an attempt to assist Papaila to make his third-quarter quota, Fulford and Huffman went to Mexico to meet with Telektra representatives with the hopes of persuading them to buy additional products from Uniden. Papaila made approximately 85.2 percent of his quota for the third quarter. On January 3, 1993, Papaila was terminated. The reason given was that upper management had lost confidence in him.

Uniden has approximately 400 employees of which sixteen are on temporary work assignments sent to Uniden by Uniden Japan. Such employees are all Japanese citizens who have been sent by Uniden Japan in order to protect its interests in its subsidiary. The parties refer to such Japanese citizens as Japanese expatriates. Uniden does not dispute that such employees were treated differently than American employees, and the only basis for Papaila's claims of race and national origin discrimination is the preferential treatment given to Japanese expatriates. The Japanese expatriates were sent to Uniden

on temporary work assignments by Uniden Japan. The remainder of Uniden's employees, including six of Japanese origin, were under the direct control of Uniden. The six Uniden employees of Japanese origin were treated exactly the same as all of Uniden's employees and do not receive the same treatment as the Japanese expatriates.

IV.

Applicable Summary Judgment Principles

A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that there is no genuine issue of material fact. *Anderson*, 477 U.S. at 256. The movant may discharge this burden by showing an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has carried its burden under Rule 56(c), the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. *Anderson*, 477 U.S. at 248, 256. An issue is material only if its resolution could affect the outcome of the action. *Id.* at 248. Unsupported allegations, conclusory in nature, are insufficient

to defeat a proper motion for summary judgment. *Simmons v. Lyons*, 746 F.2d 265, 269 (5th Cir. 1984).

The Fifth Circuit explained the burden placed on the nonmovant:

> When the nonmovant fails to make a sufficient showing on an essential element of her case, the moving party is entitled to summary judgment "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

McKee v. City of Rockwall, Texas, 877 F.2d 409, 414-15 (5th Cir. 1989) (quoting *Celotex Corp.*, 477 U.S. at 323), *cert. denied*, 493 U.S. 1023 (1990).

V.

Analysis

A. Breach of Contract:

The general rule in Texas is that employment is terminable at will at any time by either party, with or without cause, absent an agreement to the contrary. *See Federal Express v. Dutchmann*, 846 S.W.2d 282 (1993); *Eastline & R.R.R. Co. v. Scott*, 72 Tex. 70, 10 S.W. 99, 102 (1888); *see also Benoit v. Polystar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App. – Beaumont 1987, writ ref'd n.r.e.). The parties may, either in writing or orally, modify the at-will employment status of an employee. *Goodyear Tire & Rubber Co. v. Portia*, 836 S.W.2d 664 (Tex. App. – Corpus Christi 1992); *Johnson v. Ford Motor Co.*, 690 S.W.2d 90 (Tex. App. – Eastland 1995, writ ref'd n.r.e.). However, if

the term of contracted employment is intended to exceed one year, the employment contract must be in writing. *See* Tex. Bus. & Comm. Code Ann. § 26.01(b)(6) (Vernon 1987); *Winograd v. Willis*, 789 S.W.2d 307, 310 (Tex. App – Houston [14th Dist.] 1990); *Bowser v. McDonalds Corp.*, 714 F. Supp. 839, 842 (S.D. Tex. 1989). When there is an agreement to retain an employee until he retires, and the retirement will not occur within one year, the statute of frauds requires a writing. *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991). The writing must be signed by the party to be charged, or by someone lawfully authorized to sign for him. Tex. Bus. & Comm. Code Ann § 26.01(a)(2) (Vernon 1987). *See also Hall v. Hall*, 158 Tex. 95, 308 S.W.2d 12 (1957).

Papaila asserts, in effect, that Uniden contracted with him to employ him until his retirement. At the time the alleged contract was made, Papaila was forty-two years old; and, the retirement age under Uniden's 401K plan was fifty-nine and one-half. Because he could not have retired within one year, any such contract must conform to the statute of frauds. *See* Tex. Bus. & Comm. Code Ann. § 26.01 (Vernon 1987). The letter upon which Papaila relies to meet the writing requirement was from him to Uniden. It was not signed by anyone on behalf of Uniden.[2] Therefore, there is no summary judgment evidence of an enforceable employment contract. *See* Tex. Bus. & Comm. Code Ann. § 26.01(a)(2). Papaila has also alleged that Uniden breached an employment contract with him

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[2] Although there are some handwritten notations on the letter, there is no summary judgment evidence as to who made such notations or what they mean.

by demoting him on April 1, 1992. However, he has failed to produce any summary judgment evidence on, or even argue the terms of, any contract that would have been breached by the demotion. Such unsupported allegations, conclusory in nature, are insufficient to defeat Uniden's motion for summary judgment. *See Simmons*, 746 F.2d 265. Thus, the court has concluded that Uniden is entitled to summary judgment as to the breach of contract claims.

B. Discrimination Based on National Origin and Race:

Title VII provides that it shall be unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Uniden contends that, despite the prohibition in Title VII against discrimination based on race or national origin, article VIII(1) of the FCN Treaty entitles it to treat Japanese expatriates differently than American workers. Article VIII(1) of the FCN Treaty provides in pertinent part:

> [C]ompanies of either party shall be permitted to engage, within the territories of the other party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.

This article of the FCN Treaty applies only to companies of one of the treaty countries operating in the other country. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 182 (1982). In *Sumitomo Shoji* the Court held that local subsidiaries are considered for purposes of the FCN Treaty to be companies of the country in which they

are incorporated. *Sumitomo Shoji*, 457 U.S. at 188. Thus, a subsidiary incorporated in the United States is not directly covered by article VIII(1). *Id.* at 183. The Court, however, left open the question as to whether an American company may assert the article VIII(1) rights of its parent Japanese company. *Id.* at n.19.

The only reported court opinion that specifically addresses the issue as to whether a United States corporation can assert the article VIII(1) rights of its parent Japanese corporation is the Seventh Circuit's opinion in *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991). In *Fortino*, the court held that an American subsidiary of a Japanese parent company must be allowed to assert the article VIII(1) FCN Treaty rights of its parent. *Fortino*, 950 F.2d at 393. The court concluded that a judgment forbidding the American subsidiary from giving preferential treatment to the expatriate executives sent by its parent to work for the subsidiary would have the same effect on the parent as it would have if it ran directly against the parent – it would prevent the parent from sending its own executives to manage its American business in preference to employing United States citizens. *Id.* This court finds the Seventh Circuit's reasoning persuasive and concludes that Uniden must be allowed to assert the treaty rights of Uniden Japan in order to "prevent the treaty from being said at naught." *Id.* Having determined that Uniden must be allowed to assert the treaty rights of Uniden Japan, the court must now determine what those rights are.

The "of their choice" language in article VIII(1) does not mean that a Japanese company has a blanket authority to discriminate against individuals based on their

race, color, religion, sex, or national origin as such discrimination would clearly be in violation of Title VII. The FCN Treaty language does, however, mean that "[c]ompanies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws."[3] *Spiess v. Itoh & Co., Inc.*, 643 F.2d 353, 361 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982); *see also Fortino*, 950 F.2d at 389; *Macnamara v. Korean Air Lines*, 863 F.2d 1135 (3rd Cir. 1988).

Article VIII(1) exempts the entity asserting such rights "from domestic employment discrimination laws to the extent of permitting discrimination in favor of Japanese citizens in employment for executive and technical positions." *Spiess*, 643 F.2d at 359.[4]

In this case Uniden Japan exercised its rights under the FCN Treaty to choose citizens of its own nation, because they are such citizens, to operate its business in the United States. "This was favoritism all right, but discrimination in favor of foreign executives given a special status by virtue of a treaty and its implementing regulations is not equivalent to discrimination on the

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[3] Papaila argues that there is a conflict between the treaty and Title VII and that Title VII should prevail because it was enacted after the treaty was signed. "Only when Congress clearly intends to depart from the obligations of a treaty will inconsistent federal legislation govern." *Spiess*, 643 F.2d at 356. There is no such intent in Title VII. *See id.*

[4] Because the Supreme Court vacated and remanded the case on other grounds, the Fifth Circuit's ruling on this issue remains valid, controlling law. *See Adams v. Mitsubishi Bank Ltd.*, 751 F. Supp. 1548 n.8. (E.D. N.Y. 1990).

basis of national origin." *Fortino*, 950 F.2d at 392; *see Spiess*, 643 F.2d at 389. Papaila has failed to adduce summary judgment evidence that any of Uniden's employees of Japanese origin, but not Japanese citizens, were in any way favored by Uniden. To the contrary, the summary judgment evidence shows that such employees were treated the same as all other Uniden employees of non-Japanese citizenship. *See Fortino*, 950 F.2d at 389.

The court concludes that Uniden is entitled to assert the FCN Treaty rights of its parent corporation and that such treaty rights include the right to discriminate in favor of Japanese citizens. Therefore, Uniden is entitled to summary judgment as to Papaila's claim of discrimination in violation of Title VII.

Treaties such as the FCN Treaty are "the supreme law of the land," and supersede inconsistent state law. U.S. Constitution art. 6, cl. II; *United States v. Pink*, 315 U.S. 203, 230 (1942); *DeTenorio v. McGowan*, 510 F.2d 92, 95 (5th Cir. 1975). The court concludes, therefore, that Uniden is entitled to summary judgment on Papaila's claim of discrimination on the basis of race and national origin brought pursuant to the TCHRA.

VI.
Order

For the reasons discussed herein, the court ORDERS that the motion of Uniden for summary judgment be, and is hereby, granted as to Papaila's claims for breach of contract and discrimination on the basis of race and national origin.

The court has under advisement the ground of Uniden's motion for summary judgment pertaining to Papaila's age discrimination claim.

SIGNED January 10, 1994.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

THEODORE S. PAPAILA, Plaintiff,	§	NO. 4:93-CV-336-A
VS.	§	
UNIDEN AMERICA CORPORATION, Defendant.	§	

ORDER

(Filed Jan. 27, 1994)

Came on to be considered in the above-styled and numbered action the motion of plaintiff, Theodore S. Papaila, ("Papaila") for reconsideration of order granting partial summary judgment. All the points presented by Papaila in his motion for reconsideration have already been considered by the court in granting partial summary judgment. Therefore,

The court ORDERS that Papaila's motion for reconsideration of order granting partial summary judgment be, and is hereby, denied.

SIGNED January 27, 1994.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

THEODORE S. PAPAILA, Plaintiff,	§	NO. 4:93-CV-336-A
VS.	§	
UNIDEN AMERICA CORPORATION, Defendant.	§	

FINAL JUDGMENT AS TO ALL CLAIMS

(Filed Jan. 28, 1994)

Consistent with the memorandum opinion and order signed by the court January 10, 1994, by which the summary judgment of defendant, Uniden America Corporation, as to the claims of plaintiff, Theodore S. Papaila, for breach of contract and discrimination on the basis of race and national origin were granted and the final judgment of dismissal with prejudice signed by the court January 27, 1994, by which, pursuant to a settlement agreement of the parties, plaintiff's causes of action for age discrimination and breach of contract were dismissed with prejudice,

The court ORDERS, ADJUDGES and DECREES that all claims and causes of action asserted by plaintiff against defendant be, and are hereby, dismissed.

SIGNED January 28, 1994.

/s/ John McBryde
JOHN McBRYDE
United States District Judge